

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

DONA M. GALLOWAY

Claimant

VS.

U.S.D. 497

Self-Insured Respondent

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Docket No. 1,008,994

ORDER

STATEMENT OF THE CASE

Respondent requested review of the February 2, 2009, Award entered by Administrative Law Judge Brad E. Avery. The Administrative Law Judge (ALJ) found that claimant had a 25 percent permanent partial impairment to her right upper extremity. The Board heard oral argument on May 20, 2009. In its Order of June 29, 2009, the Board found that the independent medical examination reports of Dr. Mary Ann Hoffmann and Dr. Lynn Ketchum would be considered as evidence, except for the percentage of permanent impairment of function rating opinion given by Dr. Ketchum because the ALJ did not request that Dr. Ketchum address the question of permanent impairment. The Board then found that claimant had a 5 percent loss of use to her right upper extremity at the level of the forearm.

Claimant appealed the Board's Order to the Kansas Court of Appeals. The court reversed the Board's Order excluding Dr. Ketchum's rating opinion and remanded the case back to the Board with directions to reconsider the ALJ's award in light of Dr. Ketchum's opinion regarding claimant's permanent impairment rating.

The record considered by the Board is listed in the ALJ's Award of February 2, 2009. The Board likewise accepts the parties' Stipulations listed in that Award.

APPEARANCES

Stephanie J. Wilson, of Lawrence, Kansas, appeared for claimant. Kip A. Kubin, of Kansas City, Missouri, appeared for the self-insured respondent. The Acting Director, Seth Valerius, appointed E.L. Lee Kinch to serve as Appeals Board Member Pro Tem in place of retired Board Member Carol Foreman.

ISSUES

The only issue before the Board is the nature and extent of claimant's disability considering all the evidence in the record, including the rating opinion contained in the medical report of Dr. Ketchum.¹

FINDINGS OF FACT

The findings of facts as set out in the Board's Order of June 29, 2009, are incorporated herein and will not be repeated except to explain the Board's conclusions.²

PRINCIPLES OF LAW

K.S.A. 2009 Supp. 44-501(a) states in part: "In proceedings under the workers compensation act, the burden of proof shall be on the claimant to establish the claimant's right to an award of compensation and to prove the various conditions on which the claimant's right depends."

K.S.A. 2009 Supp. 44-508(g) defines burden of proof as follows: "'Burden of proof' means the burden of a party to persuade the trier of facts by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record."

K.S.A. 44-510d(a) states in part:

Where disability, partial in character but permanent in quality, results from the injury, the injured employee shall be entitled to the compensation provided in K.S.A. 44-510h and 44-510i and amendments thereto, but shall not be entitled to any other or further compensation for or during the first week following the injury unless such disability exists for three consecutive weeks, in which event compensation shall be paid for the first week. Thereafter compensation shall be paid for temporary total loss of use and as provided in the following schedule, 66 2/3% of the average gross weekly wages to be computed as provided in K.S.A. 44-511 and amendments thereto, except that in no case shall the weekly compensation be more than the maximum as provided for in K.S.A. 44-510c and amendments thereto. If there is an award of permanent disability as a result of the injury there shall be a presumption that disability existed immediately after the injury and compensation is to be paid for not to exceed the number of weeks allowed in the following schedule:

. . . .

¹ Despite the Board's request for briefs upon the Court of Appeals' remand of this case to the Board, neither claimant nor respondent filed briefs or requested oral argument.

² See *Galloway v. U.S.D. 497*, No. 1,008,994, 2009 WL 1996457 (Kan. WCAB June 29, 2009).

(13) For the loss of an arm, excluding the shoulder joint, shoulder girdle, shoulder musculature or any other shoulder structures, 210 weeks, and for the loss of an arm, including the shoulder joint, shoulder girdle, shoulder musculature or any other shoulder structures, 225 weeks.

.....
(23) Loss of a scheduled member shall be based upon permanent impairment of function to the scheduled member as determined using the fourth edition of the American Medical Association Guides to the Evaluation of Permanent Impairment, if the impairment is contained therein.

K.A.R. 51-7-8 states in part:

(a)(1) If a worker suffers a loss to a member and, in addition, suffers other injuries contributing to the temporary total disability, compensation for the temporary total disability shall not be deductible from the scheduled amount for those weeks of temporary total disability attributable to the other injuries.

.....
(c)(4) An injury at the joint on a scheduled member shall be considered a loss to the next higher schedule.

ANALYSIS

The ALJ adopted the 25 percent functional impairment rating opinion given by Dr. Ketchum "[b]ecause the only admitted injury which is the subject of this docket number occurred on November 6, 2002."³ The ALJ rejected the 5 percent impairment of function rating given by Dr. Bieri because he referred to an accident of November 4, 2002. He rejected the 0 percent functional impairment rating of Dr. Fevurly because Dr. Fevurly referred to injuries of November 4, 2002, and November 7, 2002.

As the Board pointed out in its previous Order, claimant gave different accident dates to almost every physician that examined her. Nevertheless, it appears she was referring to the same accident and injury each time.⁴ The Board finds the opinions of both Dr. Bieri and Dr. Ketchum are credible. Giving weight to the rating opinions of both these experts, the Board finds claimant's permanent impairment of function is 15 percent to her right upper extremity at the level of the forearm.

CONCLUSION

Claimant is entitled to an award of permanent partial disability compensation based upon a 15 percent loss of use of her forearm.

³ ALJ Award (Feb. 2, 2009), at 3.

⁴ See footnote 2 at pg. 3 in the Board's June 29, 2009, Order.

AWARD

WHEREFORE, it is the finding, decision and order of the Board that the Award of Administrative Law Judge Brad E. Avery dated May 2, 2009, is modified to find claimant has a 15 percent loss of use of her right upper extremity at the level of the forearm.

Claimant is entitled to 30 weeks of permanent partial disability compensation, at the rate of \$155.12 per week, in the amount of \$4,653.60, for a 15 percent loss of use of the forearm, making a total award of \$4,653.60, all of which is due and owing and ordered paid in one lump sum, less any amounts previously paid.

IT IS SO ORDERED.

Dated this _____ day of December, 2010.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Stephanie J. Wilson, Attorney for Claimant
Kip A. Kubin, Attorney for the Self-Insured Respondent
Brad E. Avery, Administrative Law Judge